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7

8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**  
10 **WESTERN DIVISION**  
11

12 KYLE SAWYER, Individually and  
on behalf of all others similarly  
13 situated,

14 Plaintiff,

15 v.

16 BILL ME LATER, INC., EBAY  
INC., PAYPAL, INC., and  
17 DOES 1-100,

18 Defendants.  
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Case No. CV-10-4461 SJO (JCGx)

**DEFENDANT BILL ME LATER,  
INC.'S NOTICE OF MOTION AND  
MOTION TO DISMISS  
COMPLAINT; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

Hearing Date: August 9, 2010  
Time: 10:00 a.m.  
Dept: Courtroom 1  
Judge: Hon. S. James Otero

Date Filed: May 21, 2010

**NOTICE OF MOTION**

**TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:**

NOTICE IS HEREBY GIVEN that on August 9, 2010 at 10:00 a.m., or as soon thereafter as counsel may be heard on this matter, in the above-captioned Court, at 312 N. Spring St., Los Angeles, CA 90012, in Courtroom 1, Defendant Bill Me Later, Inc. will and hereby does move the Court to dismiss Plaintiff's class action complaint. This motion is brought on the grounds that Plaintiff has failed to state a claim on which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff fails to state a claim under Utah law, which governs this action pursuant to a choice of law provision to which he agreed. But even if this Court declines to enforce the choice of law provision, Plaintiff's claims for usurious interest and improper late fees are preempted by the federal banking laws because they are, in reality, directed against the true lender—CIT Bank, which is a state-chartered, federally insured bank subject to the Federal Deposit Insurance Act, 12 U.S.C. § 1831d. Plaintiff's UCL claim, premised on these preempted claims, likewise fails. Plaintiff's remaining claim under the Consumer Legal Remedies Act also fails as a matter of law because that Act does not apply to extensions of credit and, regardless, Plaintiff has not alleged sufficient facts to support such a claim.

This motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities filed herewith, the Declaration of Thomas P. Brown and the exhibits thereto, the argument of counsel, and any other matters properly considered by the Court at the hearing on this motion.

This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on June 18, 2010.

Concurrently with this motion, Defendants Bill Me Later, Inc., eBay Inc. and PayPal, Inc. filed a Motion to Dismiss for Improper Venue or in the Alternative to Transfer Venue under Rule 12(b)(3). If this Court grants that venue motion, it need

1 not reach this motion to dismiss.

2  
3  
4 Dated: June 24, 2010

O'MELVENY & MYERS LLP

5 By: /s/ Thomas P. Brown

6 Thomas P. Brown  
7 Attorneys for Defendant  
8 BILL ME LATER, INC.  
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1                                   **MEMORANDUM OF POINTS AND AUTHORITIES**

2                                   **INTRODUCTION**

3           This case raises a simple question—whether Plaintiff may borrow money  
4 from an out-of-state bank and then disavow the loan contract by invoking the  
5 bank’s relationship with a third party, Bill Me Later. The answer to this question is  
6 plainly no.

7           Plaintiff admits that he borrowed money from CIT Bank, a bank chartered in  
8 Utah. And he admits that the terms of his loan are legal under both Utah law and  
9 California law so long as CIT is the “true lender” on the loan. But he claims that  
10 California law relieves him of the obligation to pay the agreed-upon interest and  
11 fees under his contract with CIT because of the relationship between CIT and Bill  
12 Me Later. And, to be sure, Bill Me Later provides a suite of services in connection  
13 with Plaintiff’s loan, including signing merchants to accept payments generated on  
14 the Bill Me Later network, servicing loans generated on the network, and  
15 purchasing receivables on such loans. But, having already completed a round of  
16 briefing on the issue in another federal court, Plaintiff has yet to provide a single  
17 case, law, or regulation to support this proposition. Nor has he explained what  
18 about the relationship between CIT and Bill Me Later needs to change to render  
19 CIT the “true lender” on the loan that it extended to him.

20           In the end, Plaintiff’s case reduces to a convenient omission. Although his  
21 case originates with his contract with CIT, he has chosen to sue various third parties  
22 to that arrangement: eBay Inc., PayPal, Inc., and Bill Me Later. He did so to try to  
23 avoid the absolute defense, preemption, that blocks his claim. But because the  
24 complaint challenges the substantive terms on which CIT extended him credit—*i.e.*,  
25 the interest rate and late fees—preemption cannot be avoided. Under both  
26 California law and the federal banking laws, CIT is allowed to charge California  
27 consumers the interest rates and late fees allowed by the law of its home state, Utah.  
28 Even the choice of law provision in Mr. Sawyer’s Account Agreement requires the

1 application of Utah law. And, of course, the challenged rates and fees are allowed  
 2 by Utah law. Mr. Sawyer cannot avoid this fact by miscasting this as an action  
 3 against Bill Me Later, PayPal and eBay.

## 4 **STATEMENT OF THE CASE**

### 5 **I. THE PARTIES**

6 Bill Me Later, Inc. is a subsidiary of eBay, Inc. and is headquartered in  
 7 Timonium, Maryland. (D.E. No. 5, Ex. 6 (“Compl.”) ¶ 11.) Plaintiff Kyle Sawyer  
 8 is an individual from California who claims he used Bill Me Later in October 2008  
 9 to obtain a loan funded by CIT Bank to purchase a \$1,068.08 computer from  
 10 Cyberpower, Inc. (*Id.* ¶¶ 10, 58.) Defendants eBay Inc. and PayPal, Inc. are both  
 11 headquartered in San Jose, California. (*Id.* ¶¶ 12-13.)

### 12 **II. BILL ME LATER**

13 Bill Me Later’s service provides consumers with a quick and secure  
 14 alternative to credit cards for purchases made on the internet or over the phone.  
 15 (Compl. ¶ 1; Ex. A to Brown Decl. ¶ 2 (Agreement),<sup>1</sup> at 3-4; *see also* Ex. B to  
 16 Brown Decl. ¶ 3 (Erika Brown, *Technology: Credit Card Killer*, Forbes (Dec. 11,  
 17 2006)).) Like Visa or MasterCard, Bill Me Later forms relationships with  
 18 participating merchants and facilitates consumer loans from a bank (CIT Bank  
 19 (“CIT”)) to pay for purchases from those merchants. As with the payment services  
 20 offered by Visa and MasterCard, participation by federal or state chartered  
 21 institutions is critical. By working with a chartered institution, Bill Me Later can  
 22 ensure that its users have access to the same credit terms and conditions anywhere  
 23 in the country.

24 To use Bill Me Later, the consumer simply enters the last four digits of his

---

25 <sup>1</sup> Because Mr. Sawyer referred to the Terms and Conditions of the Bill Me Later  
 26 Payment System in his Complaint, it is appropriate to attach the entire Agreement  
 27 to this motion for the Court’s consideration. *See, e.g., Bell Atl. Corp. v. Twombly*,  
 28 550 U.S. 544, 568 n.13 (2007); *Cooper v. Pickett*, 137 F.3d 616, 622 (9th Cir.  
 1997) (“[A] document is not ‘outside’ the complaint if the complaint specifically  
 refers to the document and if its authenticity is not questioned.”).

1 social security number and date of birth, and agrees to the Terms and Conditions  
 2 (“Agreement”). (*Id.* ¶ 5; Ex. A to Brown Decl. ¶ 2, at 1, 3.) All loans are  
 3 contingent on the review and acceptance of the Agreement. (*Id.*) The Agreement  
 4 contains the following choice of law provision:

5 I agree that the provisions of this Agreement relating to interest,  
 6 charges and fees shall be governed by federal law and construed in  
 7 accordance with federal law and, as made applicable by federal law,  
 8 the law of the state of Utah. Other terms and provisions shall be  
 9 governed by and construed in accordance with the law of the state of  
 10 Utah . . . .

11 (Ex. A to Brown Decl. ¶ 2, at 9.) After the applicant accepts the Agreement, Bill  
 12 Me Later’s credit approval system determines whether the applicant meets the  
 13 criteria for a CIT loan. (Compl. ¶ 5; *see also* Ex. B to Brown Decl. ¶ 3.) If the  
 14 application is approved, CIT extends credit to the consumer, funds the loan, and  
 15 pays the merchant on the consumer’s behalf. (Compl. ¶¶ 5, 50; Ex. A to Brown  
 16 Decl. ¶ 2, at 5.)

17 The loans CIT offers for use on the Bill Me Later network have nothing in  
 18 common with payday loans. Bill Me Later, on behalf of CIT, conducts a detailed  
 19 credit check of each applicant, to ensure that CIT extends credit only to  
 20 creditworthy applicants. (*See, e.g.*, Compl. ¶¶ 41, 49.) The credit that CIT offers  
 21 typically serves as an alternative for consumers with relatively good credit, rather  
 22 than a source of credit for people with no alternative.<sup>2</sup> (*Id.* ¶ 57.) And as  
 23 Mr. Sawyer admits, the majority of CIT’s customers pay off their balance within  
 24 30 days, meaning that they pay nothing to use the service. (*Id.*) In contrast, payday  
 25

26 <sup>2</sup> This is clear from the decision cited in Mr. Sawyer’s complaint: *Flowers v.*  
 27 *EZPawn Okla., Inc.*, 307 F. Supp. 2d 1191, 1205 (N.D. Okla. 2004) (payday loans  
 28 targeted toward borrowers in working class and low-income communities across  
 the state).

1 loans typically require an up-front, non-refundable finance charge.<sup>3</sup>

### 2 **III. MR. SAWYER'S CLAIMS**

3 Mr. Sawyer does not allege that the interest rate and late fees assessed on his  
4 Bill Me Later account exceed any limit imposed by Utah law, but instead brings his  
5 claims under California law. Mr. Sawyer alleges that the late fees are void as  
6 unauthorized penalties under California Civil Code section 1671, and that the  
7 interest rate violates California's usury law, Section 1 of Article XV of the  
8 California Constitution. (Compl. ¶¶ 71-74, 78-83.) Mr. Sawyer asserts that these  
9 violations also constitute "unlawful" and "unfair" business practices under  
10 California's Unfair Competition Law ("UCL") and violate the Consumers Legal  
11 Remedies Act ("CLRA"). (*Id.* ¶¶ 1, 75-77, 84-95.)

### 12 **LEGAL STANDARD**

13 The Federal Rules of Civil Procedure require "a short and plain statement of  
14 the claim showing that [plaintiff] is entitled to relief." Fed. R. Civ. P. 8(a). "[A]  
15 plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires  
16 more than labels and conclusions." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555  
17 (2007). A formulaic recitation of the elements of the claims will not suffice, and  
18 the court cannot assume the truth of conclusory allegations unsupported by facts.  
19 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009). The court also cannot assume the  
20 truth of allegations contradicted by facts contained in exhibits or that are subject to  
21 judicial notice. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.  
22 2001). If, after stripping the complaint of rhetoric and disregarding facts that  
23 cannot be accepted as true, the facts alleged would not support a verdict for the  
24 plaintiff, the complaint must be dismissed.

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26  
27 <sup>3</sup> See, e.g., *Flowers*, 307 F. Supp. 2d at 1196 (plaintiff paid \$63 finance charge for  
28 a fourteen-day cash advance of \$350).

## ARGUMENT

### **I. UNDER THE CONTRACTUAL CHOICE OF LAW PROVISION, UTAH LAW APPLIES AND MR. SAWYER FAILS TO STATE A CLAIM**

All of Mr. Sawyer's claims arise out of the terms and representations contained in the Agreement, which contains a choice of law provision requiring the application of Utah law. Since Mr. Sawyer states no claims under Utah law, his complaint should be dismissed.

#### **A. The Choice of Law Provision Applies to Mr. Sawyer's Claims**

Under California law, "a separate conflict of laws inquiry must be made with respect to each issue in the case." *Washington Mutual Bank, FA v. Superior Court*, 24 Cal. 4th 906, 920 (2001). But when a party "enters into an agreement establishing a transaction or relationship and provides that disputes arising from the agreement shall be governed by the law of an identified jurisdiction, the logical conclusion is that he or she intended that law to apply to *all* disputes arising out of the transaction or relationship." *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 469 (1992) (applied to consumer contracts of adhesion in *Washington Mutual*, 24 Cal. 4th at 906). The choice of law provision states that Utah law governs all of the terms and provisions of the Agreement, including the "interest, charges and fees." (Ex. A to Brown Decl. ¶ 2, at 9.)

Mr. Sawyer's alleged causes of action for breach of contract, violation of California usury law, and violation of the California UCL directly challenge the interest rates, charges and fees provided for under the Agreement. (*See* Compl. ¶¶ 71-74, 78-95.) And Mr. Sawyer's CLRA claim alleges misrepresentations directly related to the terms of the Agreement. (*See id.* ¶¶ 75-77.) Because these disputes all "aris[e] out of the transaction or relationship" created by the Agreement, the choice of law provision applies to all of them.

#### **B. Under California Choice of Law Principles, Utah Law Governs**

"In determining the enforceability of a choice of law provision in a diversity

1 action, a federal court applies the choice of law rules of the forum state.” *Hatfield*  
 2 *v. Halifax, PLC*, 564 F.3d 1177, 1182 (9th Cir. 2009). If the parties state their  
 3 intention through an express choice of law provision, California courts will  
 4 ordinarily enforce the provision. *Id.* (reversing refusal to enforce provision).

5 The proponent of the clause must “demonstrate[] that the chosen state has a  
 6 substantial relationship to the parties or their transaction, or that a reasonable basis  
 7 otherwise exists for the choice of law.” *Wash. Mut.*, 24 Cal. 4th at 917 (citing  
 8 *Nedlloyd*, 3 Cal. 4th at 465). Upon such a showing, the choice of law provision  
 9 “generally will be enforced unless the other side can establish **both** that the chosen  
 10 law is contrary to a fundamental policy of California **and** that California has a  
 11 materially greater interest in the determination of the particular issue.” *Id.*  
 12 (emphasis added).

### 13 **1. Utah Has a Substantial Relationship to the Parties and** 14 **Transaction at Issue in This Case**

15 The Agreement clearly establishes that Mr. Sawyer borrowed money from  
 16 CIT, which is located and chartered in Salt Lake City, Utah. (Ex. C to Brown Decl.  
 17 ¶ 4.) This action revolves around an Agreement executed in Utah and a loan made  
 18 in Utah. (See Ex. A to Brown Decl. ¶ 2, at 9 (“This Agreement has been accepted  
 19 by you in the state of Utah, and all loans will be extended by you in the state of  
 20 Utah”).) Therefore, Utah has a substantial relationship to the loan transaction and  
 21 to the parties to the Agreement.

### 22 **2. Mr. Sawyer Cannot Establish That Utah Law Is Contrary to** 23 **Any Fundamental California Policy**

24 Mr. Sawyer cannot avoid the choice of law provision because Utah law is not  
 25 contrary to fundamental California policy and also because California does not have  
 26 a materially greater interest in the determination of the particular issue. *Nedlloyd*, 3  
 27 Cal. 4th at 465.

28 Since choice of law provisions are generally enforced, courts have suggested

1 that such provisions can be avoided only when the chosen law is so offensive to  
 2 California public policy that it is “prejudicial to recognized standards of morality  
 3 and to the general interest of the citizens.” *Medimatch, Inc. v. Lucent Techs. Inc.*,  
 4 120 F. Supp. 2d 842, 862 (N.D. Cal. 2000); accord *Melt Franchising, LLC v. PMI*  
 5 *Enters., Inc.*, No. CV 08-4148, 2009 WL 32587 (C.D. Cal. Jan. 2, 2009).  
 6 Importantly, “[t]he mere fact that the chosen law provides greater or lesser  
 7 protection than California law, or that in a particular application the chosen law  
 8 would not provide protection while California law would, are not reasons for  
 9 applying California law.” *Medimatch*, 120 F. Supp. 2d at 862.

10 While the CLRA does contain a provision stating that “[a]ny waiver by a  
 11 consumer of the provisions of this title is contrary to public policy and shall be  
 12 unenforceable and void,” Cal. Civ. Code § 1751, courts have only found that other  
 13 states’ laws violated this fundamental policy on very limited grounds, *see, e.g., Am.*  
 14 *Online, Inc. v. Superior Court*, 90 Cal. App. 4th 1, 15 (2001). In *America Online*,  
 15 the California Court of Appeal held that applying Virginia law would violate this  
 16 anti-waiver provision because Virginia law did not allow consumer protection suits  
 17 to proceed as class actions. *Id.* at 16-17.

18 Here, by contrast, the Utah Consumer Sales Practice Act explicitly authorizes  
 19 consumer class actions. Utah Code Ann. § 13-11-19(4)(a). And where the chosen  
 20 law provides similar protection to those provided by the California UCL and  
 21 CLRA, courts will enforce the choice of law provision in favor of the chosen state’s  
 22 law. *See, e.g., Brazil v. Dell Inc.*, 585 F. Supp. 2d 1158, 1165-66 (N.D. Cal. 2008)  
 23 (holding that Texas law was not contrary to any policy under UCL or CLRA  
 24 because it provided “comparable protection”).

### 25 **C. Mr. Sawyer Has Failed to Make Out Any Claim Under Utah Law**

26 Because Utah law governs this action, and Mr. Sawyer does not state any  
 27 claims under Utah law, this Court should dismiss his claim for failure to state a  
 28 claim upon which relief can be granted.

1 **II. EVEN ABSENT THE CHOICE OF LAW PROVISION, THE CLAIMS**  
 2 **AGAINST BILL ME LATER MUST BE DISMISSED BECAUSE BILL**  
 3 **ME LATER IS NOT A PROPER PARTY TO THIS ACTION**

4 All of Mr. Sawyer's claims arise out of the terms and representations  
 5 contained in the Agreement, which makes clear that CIT is the lender. That Bill Me  
 6 Later purchases the receivables on the loans (*i.e.*, that this is, as Mr. Sawyer claims,  
 7 a "round-trip transaction") does not change this legal reality [or conclusion]. And  
 8 neither would a finding that Bill Me Later acts as CIT's agent.<sup>4</sup>

9 **A. Mr. Sawyer's Claims Arise Out of the Agreement**

10 Each of Mr. Sawyer's claims are premised on the assertion that Bill Me Later  
 11 structured a sham relationship with CIT to enable it to make loans with usurious  
 12 interest rates and charge late fees that constitute improper liquidated damages  
 13 penalties. (*See, e.g.*, Compl. ¶¶ 1-9.) But when the consumer opts to use Bill Me  
 14 Later, the only representations made regarding the nature of the loan and the  
 15 relationship between the consumer, Bill Me Later and CIT are contained in the  
 16 Agreement. In fact, the ten-page Agreement is the *only* document that the  
 17 consumer must review and agree to before using the Bill Me Later service. (Ex. A  
 18 to Brown Decl. ¶ 2, at 1, 3.) The Agreement sets the applicable interest rate and  
 19 tiered late fees. (*Id.* at 2-3.) As such, Mr. Sawyer's challenge to the interest rates  
 20 and late fees and the alleged subterfuge regarding the identity of the lender all arise  
 21 out of the Agreement.

22 **B. The Agreement Identifies CIT Bank As the Real Party in Interest**

23 The facts reflected in the Agreement trump any inconsistent allegations in the  
 24 complaint. *Sprewell*, 266 F.3d at 988. The first sentence of the Agreement states  
 25 that Bill Me Later is a service "*offered through CIT Bank*, an industrial bank

26 <sup>4</sup> This case presents a narrow legal issue of whether the relationship between Bill  
 27 Me Later and CIT is structured so as to preserve the protections the banking laws  
 28 provide CIT. If the Court is inclined to deny this motion, Defendants believe that  
 the case can be resolved on summary judgment with evidence regarding the  
 relationship between Bill Me Later and CIT, provided through affidavits from those  
 entities. Discovery should likewise be limited to this issue.

located in Salt Lake City, Utah ('the Lender')." (Ex. A to Brown Decl. ¶ 2, at 1 (emphasis added).) The parties to the agreement are defined to include CIT and the borrower; Bill Me Later, along with the merchant, is specifically identified as one of the "Other Parties" to the Agreement. (Ex. A. to Brown Decl. ¶ 2, at 3.) The Agreement also clearly states that CIT is the party making the loan. (*Id.*) And even Mr. Sawyer's complaint specifically identifies CIT as the party that extends credit to consumers in connection with the Bill Me Later payments service: "Bill Me Later relies on CIT Bank to extend credit to Bill Me Later customers in order to offer the Bill Me Later service" (Compl. ¶ 50); and "CIT Bank funds the consumer loan at the point of sale and advances funds to the merchant" (*id.*). CIT Bank is the lender and, thus, the party in interest to any action challenging the terms and conditions of the loan.

**C. Nothing About CIT's Relationship with Bill Me Later Makes Bill Me Later an Appropriate Target of Mr. Sawyer's Claims**

In determining whether federal banking laws preempt inconsistent state laws, the identity of the originating entity (CIT) and not the assignee (Bill Me Later) controls. In *Krispin v. May Department Stores*, the court found that the store's (a non-bank) purchase of the bank's loan receivables on a daily basis did not change the fact that the bank was the true lender. 218 F.3d 919, 924 (8th Cir. 2000). Simply put, the assignment of a loan, through purchase of the loan receivables or otherwise, does not change the identity of the lender. *Id.*; see also *Olvera v. Blitt & Gaines, P.C.*, 431 F.3d 285, 289 (7th Cir. 2005) ("the common law puts the assignee in the assignor's shoes, whatever the shoe size"). Nor does this fact change the preemption analysis. *FDIC v. Lattimore Land Corp.*, 656 F.2d 139, 148-49 (5th Cir. 1981) ("[t]he non-usurious character of a note should not change when the note changes hands"); *Phipps v. FDIC*, 417 F.3d 1006, 1013 (8th Cir. 2005) (borrower's state claims against subsequent purchaser of loan preempted by the NBA to the same extent as claims against the loan originator would be). As

1 Mr. Sawyer admits, Bill Me Later does not purchase the loan receivables from CIT  
 2 until after CIT funds the loan and advances those funds to the merchant. (Compl.  
 3 ¶¶ 12, 50.) And even after Bill Me Later has purchased the receivables, CIT  
 4 continues to own each customer account. (*Id.* ¶ 50.) Bill Me Later's purchase of  
 5 the loan receivables simply does not change the identity of the lender.

6 Nor does the fact that CIT uses Bill Me Later as a loan servicer change CIT's  
 7 position as the lender. The banking laws allow banks to conduct their business  
 8 through duly authorized agents. 12 U.S.C. § 24; *SPGGC, LLC v. Ayotte*, 488 F.3d  
 9 525, 532 (1st Cir. 2007). And a bank does not subject itself to foreign state laws  
 10 simply because it chooses to rely on third parties to, for example, send statements,  
 11 process transactions and interact with customers.<sup>5</sup> *Id.*; *Discover Bank v. Vaden*, 489  
 12 F.3d 594, 594 (4th Cir. 2007), *rev'd on other grounds by Vaden v. Discover Bank*,  
 13 129 S. Ct. 1262 (2009). "It would be contrary to the language and intent of the  
 14 [banking laws] to allow states to avoid preemption of their statutes simply by  
 15 enacting laws that prohibited non-bank firms from providing national banks with  
 16 the resources to carry out their banking activities." *Ayotte*, 488 F.3d at 533.

17 **III. EVEN WITHOUT THE CHOICE-OF-LAW PROVISION,**  
 18 **MR. SAWYER'S CHALLENGES TO TERMS IN AN AGREEMENT**  
 19 **WITH AN OUT-OF-STATE BANK ARE BARRED BY CALIFORNIA**  
 20 **LAW AND THE FEDERAL DEPOSIT INSURANCE ACT, 12 U.S.C.**  
 21 **§ 1831d**

22 The national banking laws allow federal and state-chartered banks to charge

23 <sup>5</sup> Mr. Sawyer's effort to use Bill Me Later's role as account servicer, network  
 24 services provider and owner of receivables to subject CIT's contract to California  
 25 law threatens to turn the consumer credit industry on its head. The Federal Deposit  
 26 Insurance Corporation ("FDIC") Examiner's Manual specifically addresses  
 27 arrangements of the sort challenged here. As the Manual explains, rent-a-BIN  
 28 (bank identification number) arrangements allow non-banks to service credit cards  
 accounts and accept the economic risk associated with those accounts. As the  
 FDIC recognizes, the non-bank generally purchases all of the account receivables  
 and also manages and services those accounts and the customer relationship.  
 (FDIC Credit Card Activities Manual ch. XIV, *available at*  
[http://www.fdic.gov/regulations/examinations/credit\\_card/ch14.html](http://www.fdic.gov/regulations/examinations/credit_card/ch14.html), last visited  
 June 18, 2010.) Importantly, the "*bank is responsible* for the [rent-a-BIN] program  
 . . . *regardless of where the receivables reside.*" (*Id.* (emphasis added).)

the interest rates allowed in their home state regardless of the location of the borrower. As a state-chartered, federally insured bank, CIT is permitted to set the terms of its loans pursuant to the laws of its home state, Utah. Its relationship with Bill Me Later does not change this.

**A. The Federal Banking Laws Preempt Mr. Sawyer's Claim for Recovery of Allegedly Usurious Interest Under California Law**

The federal banking laws promote competition between federal and state-chartered banks by allowing banks of both types to extend credit on terms allowed by the law of their home state without facing prosecution under other states' usury laws. Federal law expressly preempts state usury law, meaning there is no such thing as a foreign state usury action against such banks. *See, e.g., Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 10 (2003). Even the California usury law Mr. Sawyer invokes exempts such banks from its provisions. *See* Cal. Fin. Code § 1716. His claims are therefore barred under California and federal law.

**1. The Federal Deposit Insurance Act Allows CIT to Set Interest Rates Consistent with Utah Law, Which It Has**

CIT cannot be denied the protection of the federal banking laws through Plaintiff's creative pleading. The Federal Deposit Insurance Act, 12 U.S.C. § 1831d ("FDIA"), allows CIT to set whatever interest rates and fees the state of Utah permits and to export those interest rates and fees to other states. The FDIA provides state-chartered, federally insured institutions such as CIT with essentially the same freedoms as institutions chartered under the National Banking Act, 12 U.S.C. §§ 85, 86 ("NBA"). The FDIA contains nearly the same language as the NBA:

(a) Interest rates. [T]o prevent discrimination against State-chartered insured depository institutions . . . with respect to interest rates . . . such State bank[s] . . . may, *notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section* . . .

1 charge on any loan . . . interest . . . *at the rate allowed by the laws of*  
 2 *the State, territory, or district where the bank is located . . . .*

3 12 U.S.C. § 1831d(a) (emphasis added). Congress borrowed this provision from  
 4 the NBA, and specifically intended the FDIA to have the same preemptive scope as  
 5 the NBA: “The FDIA was enacted in part to “provide parity, or competitive  
 6 equality, between national banks and State chartered depository institutions.”  
 7 *Vaden*, 489 F.3d at 604 (quoting 126 Cong. Rec. 6908 & 6900 (1980) (statements  
 8 of Sen. Bumpers and Sen. Proxmire, respectively)). Cases interpreting the NBA  
 9 are, therefore, persuasive authority when determining the preemptive reach of the  
 10 FDIA. *Greenwood Trust Co. v. Mass.*, 971 F.2d 818, 827 (1st Cir. 1992) (“[t]he  
 11 historical record clearly requires a court to read the parallel provision of [the FDIA]  
 12 and the Bank Act in pari materia”).

13 Mr. Sawyer cannot invoke California law in a suit against Bill Me Later to  
 14 preclude enforcement of his contract with CIT. CIT has a charter from Utah and is  
 15 federally insured. (Exs. C & D to Brown Decl. ¶¶ 4, 5.) Under California law, CIT  
 16 is exempt from state usury laws, and under the FDIA it may charge the interest rate  
 17 allowed by Utah law. Cal. Fin. Code § 1716; 12 U.S.C. § 1831d. Utah law allows  
 18 the parties to contractually agree to any amount of interest. Utah Code Ann.  
 19 § 15-1-1(1). And CIT and Mr. Sawyer agreed to the rate of 19.99% on his loan.  
 20 (Ex. A to Brown Decl., ¶ 2, at 2-3, 6.)

## 21 **2. Mr. Sawyer Cannot Avoid Preemption by Omitting the True** 22 **Lender from His Complaint**

23 Mr. Sawyer concedes that he has no claim if CIT actually extended the credit  
 24 on the terms to which he now objects. (Compl. ¶¶ 33, 34.) As a consequence,  
 25 Mr. Sawyer’s complaint goes to great lengths to conceal the inconvenient truth that  
 26 CIT is, in fact, the lender. (*See, e.g., id.* ¶¶ 4-7, 37, 40.) But this is a fact that  
 27 Mr. Sawyer cannot ultimately deny, especially since he explicitly admits that CIT  
 28 extended the loan. (*Id.* ¶¶ 49, 50.) Although Mr. Sawyer has chosen not to name

1 CIT in his complaint, this omission does not control the disposition of his claim. In  
 2 determining whether Mr. Sawyer is attempting to invoke California law against an  
 3 out-of-state bank, the Court must look at the nature of the claims instead of  
 4 Mr. Sawyer's choice of defendants. *See, e.g., Vaden*, 489 F.3d at 601. Because  
 5 Mr. Sawyer's claims revolve around his allegation that usurious interest rates were  
 6 charged on the loan made by CIT, his claims effectively target CIT.

7 In *Vaden*, the Fourth Circuit found that claims almost identical to  
 8 Mr. Sawyer's were preempted by the FDIA. *Id.* at 606.<sup>6</sup> Discovery Financial  
 9 Services ("DFS"), a non-bank servicing affiliate of Discover Bank, sought to  
 10 recover unpaid amounts on a credit card account; the cardholder counterclaimed  
 11 that the finance charges, late fees and compound interest charged on her account  
 12 violated state law. In determining whether the district court could hear the case, the  
 13 court looked at whether jurisdiction lay in preemption of the counterclaims. While  
 14 the cardholder argued against preemption on the grounds that Discover Bank was  
 15 not a party to the action, the court reasoned: "[t]he identity of the 'real' party may  
 16 not always be apparent from the face of the pleadings; it may be necessary to look  
 17 beyond the pleadings to the facts of the dispute." *Id.* at 601. The *Vaden* court  
 18 therefore looked at the relationship between the parties and the claims asserted to  
 19 determine "whether [the cardholder's] state-court counterclaims are really directed  
 20 at [the bank] rather than DFS." *Id.*

21 The *Vaden* court found that Discover Bank was the real party in interest even  
 22 though it was not named in the complaint. The following factors weighed in favor  
 23 of this finding: (1) the bank was the originator of the loan; (2) the bank and the  
 24 cardholder were the only parties to the credit agreement; (3) the bank issued the  
 25 credit on the account; and (4) the cardholder's claims challenged the interest rates

26 <sup>6</sup> Although the Supreme Court reversed the court's jurisdictional finding in *Vaden*,  
 27 the Fourth Circuit's reasoning still stands. The Court did not question or disagree  
 28 with the finding that *Vaden's* counterclaims would be preempted by the NBA.  
*Vaden v. Discover Bank*, 129 S. Ct. 1262 (2009).

1 and late fees, and so were directed against the entity extending her credit, Discover  
 2 Bank. *Id.* at 602. While DFS serviced the loans, performed all marketing and  
 3 collection efforts, and mailed monthly bills to the cardholders, this was not  
 4 sufficient to give DFS lender status, especially since DFS never identified itself as  
 5 the lender. *Id.*

6 These same factors are present here. As Mr. Sawyer acknowledges, CIT  
 7 funds the loans and extends the credit to Bill Me Later customers. (Compl. ¶ 50.)  
 8 CIT is identified as the lender in the Agreement, and CIT and the consumer are the  
 9 only “parties” identified in the Agreement. (Ex. A to Brown Decl. ¶ 2, at 1, 3.)  
 10 Mr. Sawyer’s claims challenge the loan’s interest rates and late fees, and so are  
 11 directed against the entity extending him credit, CIT. (*See, e.g.*, Compl. ¶¶ 25, 33,  
 12 34, 74, 81.) And, finally, Bill Me Later never identifies itself as the lender; as the  
 13 Agreement makes clear, CIT is the lender. (Ex. A to Brown Decl. ¶ 2, at 1, 3; *see*  
 14 *also* Argument § II.B.) These factors show that CIT is the lender.

15 *Krispin* is in accord. In *Krispin*, plaintiff sued the May Department Stores  
 16 under state law for excessive credit card late fees on a card originally issued by the  
 17 store. 218 F.3d at 919. While the store was a party to the original credit agreement,  
 18 it later created May National Bank of Arizona and gave notice to cardholders that  
 19 credit on the account would thereafter be extended by the bank. Since at the time of  
 20 suit the bank originated the loans and extended the credit to consumers, the real  
 21 party in interest was the bank. This was true even though the bank was not a party  
 22 to the action and the store purchased the bank’s receivables on a daily basis.

23 Mr. Sawyer cannot salvage his claim by choosing to name Bill Me Later  
 24 rather than CIT. “[T]he question here is not *whom* the [state] statute regulates, but  
 25 rather, against *what activity* it regulates.” *Ayotte*, 488 F.3d at 532. In *Ayotte*, the  
 26 attorney general claimed that SPGGC-branded prepaid gift cards marketed at its  
 27 shopping malls violated state consumer protection laws prohibiting gift certificates  
 28 with expiration dates and administrative fees. The attorney general argued that no

1 enforcement action had been brought against the issuing banks and that the state  
 2 laws only sought to regulate the conduct of SPGGC, a non-bank. But the court  
 3 looked at what the state laws sought to regulate—expiration dates and  
 4 administrative fees—the very terms and conditions governing the relationship  
 5 between the consumer and the issuing bank. Since the state-law claims sought to  
 6 dictate the terms of the bank-issued gift cards, those claims were directed at the  
 7 bank and preempted.

8 *Ayotte* compels a similar result here. CIT extends the loans at issue, and the  
 9 terms of the lending agreement are defined by his Agreement with CIT. (*See*  
 10 *generally* Ex. A to Brown Decl. ¶ 2.) Mr. Sawyer does not allege that he paid  
 11 interest or fees higher than the amounts he agreed to; he complains that the rates  
 12 contained in the Agreement are simply too high. (Compl. ¶¶ 56-58; Ex. A. to  
 13 Brown Decl. ¶ 2, at 2-3.) These claims, therefore, are aimed at CIT and preempted.

### 14 **3. Payday Lending Cases Cannot Revive Mr. Sawyer's Claims**

15 Mr. Sawyer's attempt to analogize Bill Me Later's consumer credit service to  
 16 a payday loan is unavailing. That CIT issues the credit on the accounts bring this  
 17 case in-line with *Krispin* and *Vaden*, where that allegation was pivotal. The  
 18 absence of such an allegation in *Flowers v. EZPawn Oklahoma, Inc.*, 307 F. Supp.  
 19 2d 1191 (N.D. Okla. 2003), which Mr. Sawyer cites in his complaint, distinguishes  
 20 *Flowers* from *Krispin*, *Vaden*, and this case. (Compl. ¶ 38.)

21 In *Flowers*, plaintiff brought a putative class action against pawnshops  
 22 offering "payday loans" to consumers at usurious interest rates. The complaint  
 23 alleged that EZPawn was the party that *lent the money* and was the *lender* on the  
 24 loan. 307 F. Supp. 2d at 1205. While defendants argued that the bank was the real  
 25 lender, they offered no evidence to support this assertion—not the loan application  
 26 or the agreement with the borrower. Absent anything to the contrary, the court  
 27 found the facts in the petition sufficient to prevent preemption. This is not the case  
 28 here. Mr. Sawyer does not dispute that CIT, not Bill Me Later, funds the loans and

1 extends the credit to the consumers. (Compl. ¶ 50.) This fact alone sufficiently  
2 distinguishes this case from *Flowers* and brings it in line with *Krispin* and *Vaden*.

3 **B. Since Late Fees Constitute “Interest” Under the Federal Banking**  
4 **Laws, Mr. Sawyer’s Breach of Contract Claim Is Likewise**  
5 **Preempted**

6 Mr. Sawyer cannot invoke California law to challenge the late fees set forth  
7 in his contract with CIT. The Supreme Court has specifically held that the term  
8 “interest” in the national banking laws includes late fees. *Smiley v. Citibank (S.D.),*  
9 *N.A.*, 517 U.S. 735, 738 n.1 & 746-47 (1996) (affirming application of definition of  
10 “interest” in 12 C.F.R. § 7.4001(a)); *see also Mamot Feed Lot & Trucking v.*  
11 *Hobson*, 539 F.3d 898, 903 (8th Cir. 2008) (applying same CFR provision to the  
12 FDIA). And for this reason, the Supreme Court has held that a California consumer  
13 cannot invoke Section 1671 to challenge the late fees contained in a contract with a  
14 foreign bank. *Smiley*, 517 U.S. at 738 n.1 & 746-47. For purposes of federal  
15 banking law, late fees are “interest,” and claims challenging excessive late fees are  
16 preempted just like claims for allegedly usurious interest. *Id.* at 747.<sup>7</sup> Simply put,  
Mr. Sawyer’s breach of contract claim is barred by the FDIA.

17 **C. Since Mr. Sawyer’s UCL Claim Is Premised on Preempted Claims,**  
18 **It Also Must Fail**

19 Mr. Sawyer’s UCL claim is premised on his assertion that the Agreement’s  
20 interest rate and late fees violate California law. (Compl. ¶¶ 85-94.) Therefore, this  
21 claim rises and falls with his claims challenging the interest rate and late fees. As  
22 discussed above, the alleged usurious interest and penalty late fees are lawful under  
23 applicable Utah law. And such lawful acts cannot support a claim for “unlawful”  
24 practices. *See, e.g., Stearns v. Select Comfort Retail Corp.*, No. 08-2746 JF, 2009

25  
26 <sup>7</sup> Under the choice of law and preemption analysis, Utah law applies and the late  
27 fees comply with that law. Utah Code Ann. § 70C-1-106 (delinquency fees  
28 considered interest for purposes of determining interest allowed under NBA or  
FDIA); § 70C-2-102(1)(b) (sets no limit on the amount of delinquency charges  
allowed in consumer credit agreements entered after May 3, 1999).

1 WL 1635931, at \*16 (N.D. Cal. June 5, 2009) (if plaintiff's statutory claims fail,  
2 those business practices are not "unlawful" under the UCL).<sup>8</sup>

3 The same is true for Mr. Sawyer's claim for "unfair" business practices.  
4 (Compl. ¶ 95.) Actions that are permitted under another statute—such as the  
5 FDIA—cannot be "unfair" practices under the UCL. *Cel-Tech Commc'ns, Inc. v.*  
6 *L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 184 (1999).

7 This case is similar to *In re Late Fee & Over-Limit Fee Litigation*, 528 F.  
8 Supp. 2d 953 (N.D. Cal. 2007). In *Late Fee*, plaintiff consumers alleged that  
9 defendant banks engaged in "unfair" practices by imposing excessive late and over-  
10 limit fees. *Id.* at 957. These claims were found to be preempted by the NBA and in  
11 compliance with applicable state law. *Id.* at 965. The court held that "under the  
12 substantive terms of the UCL, the defendant banks could not properly be deemed to  
13 have engaged in unfair or deceptive practices under the statute by acting  
14 consistently with all existing legal interpretations of the NBA and with the express  
15 disclosures of their contracts concerning late and over-limit fees." *Id.* at 965-66;  
16 *see also Spiegler v. Home Depot U.S.A., Inc.*, 552 F. Supp. 2d 1036, 1045 (C.D.  
17 Cal. 2008) (as a matter of law there could not be any "unfair" conduct where the  
18 defendants "complied with the express terms of the contracts, and charged plaintiffs  
19 in accordance with their terms.").

20 The same result is required here. CIT's interest rates and late fees are  
21 *expressly authorized* by the FDIA because they comply with Utah law. The interest  
22 rates and late fees also comply with the express terms of the Agreement. The  
23 interest rates and fees are neither "unlawful," "unfair," nor "deceptive" under the  
24 UCL. (See Compl. ¶¶ 85-95.)

25  
26  
27 <sup>8</sup> To the extent Mr. Sawyer's UCL claims also rely on an alleged violation of the  
28 CLRA, that claim fails for the reasons set forth below. (See Argument § IV;  
Compl. ¶ 89.)

1 **IV. UNDER CALIFORNIA LAW, MR. SAWYER'S CLRA CLAIM FAILS**  
 2 **AS A MATTER OF LAW**

3 The CLRA only applies when the alleged unfair methods of competition or  
 4 unfair or deceptive acts or practice relate to a “transaction intended to result or  
 5 which results in the sale or lease of *goods or services* . . . .” Cal. Civ. Code  
 6 § 1770(a) (emphasis added). But a loan is neither a good nor a service as defined  
 7 by the Act. Under the Act, “goods” are defined as “tangible chattels,” and  
 8 “services” are defined as “work, labor, or services for other than a commercial or  
 9 business use, including services furnished in connection with the sale or repair of  
 10 goods.” *Id.* §§ 1761(a), (b). A loan is an intangible good, and even if some  
 11 ancillary loan services are provided, that does not “bring these [intangible] goods  
 12 within the coverage of the CLRA.” *Consumer Solutions REO, LLC v. Hillery*, 658  
 13 F. Supp. 2d 1002, 1016 (N.D. Cal. 2009).

14 This interpretation is supported by the Act’s drafting history. While the  
 15 draft Act included the phrase “goods, services, *money, or credit*,” the terms “money  
 16 or credit” were removed before enactment. *Berry v. Am. Express Publ’g, Inc.*, 147  
 17 Cal. App. 4th 224, 230 (2007). This omission demonstrates a clear legislative  
 18 intent that the Act not apply to transactions to obtain a loan. *Id.* at 230-31. As  
 19 such, “extension[s] of credit . . . *separate and apart* from the sale or lease of any  
 20 specific goods or services, do[] not fall within the scope of the act.” *Id.* at 227; *see*  
 21 *also Augustine v. FIA Card Servs., N.A.*, 485 F. Supp. 2d 1172, 1175 (E.D. Cal.  
 22 2007). Although the credit obtained using Bill Me Later is used to purchase a good  
 23 or service, this is not sufficient to bring the loan within the CLRA. *Berry*, 147 Cal.  
 24 App. 4th at 229-30 (that the consumer may use his credit card to purchase goods or  
 25 services does not bring extensions of credit within the CLRA).

26 Independently, the complaint lacks sufficient facts to support a CLRA  
 27 claim. Mr. Sawyer alleges that Bill Me Later “disguise[d] the true lending  
 28 relationship in connection with these consumer loans.” (Compl. ¶ 1.) But the

1 nature of the lending relationship and the loan product offered by CIT are both fully  
 2 disclosed in the Agreement, which contains the only representations made during  
 3 the pre-loan interaction with Bill Me Later. (Ex. A to Brown Decl. ¶ 2.) The  
 4 Agreement clearly states that CIT is the lender. (*Id.* at 1, 4; *see also* Argument  
 5 § II.B.) The Agreement also clearly describes the nature of the account:

6 This is a multi-part open-end credit account. [Consumer] will request  
 7 a loan on this Account by choosing the Bill Me Later Payment System  
 8 when [he] make[s] a purchase from a Merchant . . . . Purchases will be  
 9 added to the balance . . . . [CIT] will charge a Finance Charge on all  
 10 parts of this Account, beginning on each transaction date, except  
 11 during the Grace Period . . . .

12 (Ex. A to Brown Decl. ¶¶ 2, 4.) And in describing how to obtain loans on the  
 13 account, the Agreement states that after choosing to pay using Bill Me Later “[CIT]  
 14 will make a loan to [consumer], in the amount of the Cost of the purchase, by  
 15 paying the Merchant on [his] behalf.” (*Id.*) Bill Me Later is described as the party  
 16 who “developed [the Bill Me Later Payment System] and provides services for  
 17 [CIT], such as processing transactions, keeping records, sending billing statements  
 18 and providing customer service.” (*Id.* at 3.) There is no ambiguity in the  
 19 Agreement, and therefore, no basis for a CLRA claim.

20 Additionally, the CLRA only allows recovery of “damage as a result of” the  
 21 activities prohibited by the Act. Cal. Civ. Code § 1780(a). This means that  
 22 Mr. Sawyer must show not only that Bill Me Later misrepresented the true nature  
 23 of the lending relationship, but that in the absence of that misrepresentation, he  
 24 would not have agreed to the loan. *See, e.g., Kearns v. Ford Motor Co.*, 567 F.3d  
 25 1120, 1125 (9th Cir. 2009) (affirming dismissal of UCL and CLRA claims where  
 26 plaintiff failed to allege reliance on any representations made by defendants in  
 27 deciding to purchase defendants’ vehicle); *Buckland v. Threshold Enters., Ltd.*, 155  
 28 Cal. App. 4th 798, 810 (2007) (“plaintiffs asserting CLRA claims sounding in fraud

1 must establish that they actually relied on the relevant representations or  
 2 omissions”). And such facts must be pled with particularity under Federal Rule of  
 3 Civil Procedure 9(b). Fed. R. Civ. P. 9(b); *Vess v. Ciba-Geigy Corp. USA*, 317  
 4 F.3d 1097, 1103-05 (9th Cir. 2003) (Rule 9(b) pleading standard applies to UCL  
 5 and CLRA claims where plaintiff alleges fraudulent conduct). Mr. Sawyer fails to  
 6 plead **any** facts, let alone facts sufficiently particular under Rule 9(b), showing his  
 7 reliance on the alleged misrepresentations regarding the nature of the lending  
 8 relationship.

### 9 CONCLUSION

10 This case should be dismissed because Mr. Sawyer has failed to state any  
 11 claim under Utah law, as is required by the choice of law provision to which he  
 12 willingly agreed. In the alternative, this case should be dismissed because all of  
 13 Mr. Sawyer’s claims are either preempted by federal law and exempt from  
 14 California usury law, or simply fail as a matter of law.

15 Dated: June 24, 2010

O’MELVENY & MYERS LLP

16 By: /s/ Thomas P. Brown

17 Thomas P. Brown  
 18 Attorneys for Defendant  
 BILL ME LATER, INC.

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